1303 J Street, Suite 600, Sacramento, CA 95814-2939 T. 916.441.7377 F. 916.441.5756

March 31, 2010

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

Re: Regulation E-Docket Number R-1343

Dear Ms. Johnson:

I write for the California Bankers Association (CBA), which is a non-profit organization established in 1891 representing most of the FDIC-insured depository financial institutions doing business in California. CBA and its members appreciate that the Federal Reserve Board is taking the initiative to clarify some of the questions that have arisen since its issuance of the Regulation E amendments ("Rule") that created an obligation for financial institutions to obtain the affirmative consent from consumers to assess overdraft fees on non-recurring POS and ATM transactions.

At the outset we believe the clarifications in the proposed amendments ("Proposal") regarding the ability to continue assess fees related to non-covered transactions (i.e., checks, recurring POS transactions) and how to handle overdraft and other fees caused by "mixed" transactions are helpful.

Written Confirmation

An institution may not charge an overdraft fee unless, among other things, a written confirmation of a consumer's opt-in decision is furnished to the consumer. Financial institutions communicate with consumers through a variety of means. If a consumer elects to receive a consent and confirmation electronically, such as through an ATM, must the institution provide the consent and confirmation in a form that the consumer may keep, by printing the consent and confirmation? CBA requests clarification whether financial institutions may fulfill the obligation by sending them by electronic mail message or, if not, as attachments to an electronic mail message?

Model Form

- The Model Form provides: "We do not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below)"

This statement may not reflect common practice because, while a financial institution may not assess an overdraft fee for paying an overdrawing transaction that had been previously

authorized, it nevertheless may still pay it. As discussed elsewhere in the Rule, this situation could arise when intervening transactions following a prior authorization (against available funds) cause a consumer's account to be overdrawn. The failure of the Model Form to distinguish between authorizing and paying overdrafts may require financial institutions to revise it to reflect its actual practices. As financial institutions would prefer to rely as much as possible on the unmodified text of the Model Form as adopted, CBA asks that this sentence be revised to avoid the misleading implication that the institution would not allow an account to be overdrawn.

- The Model Form provides: "____ I do not want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions."

The process of communicating the opt-in right and managing and confirming elections on a large scale needs to be as uncomplicated as possible. The inclusion of the referenced right to opt out contradicts the thrust of the new standard, which is that the financial institution will not assess charges unless the consumer affirmatively consents. If the intent of this option is to allow consumers to reverse a previously furnished opt-in election, then the language should be revised to indicate this purpose or, preferably, the final rule or the staff commentary should explicitly allow financial institutions to strike this language within the Model Form.

- Disclosure of overdraft protection plan.

We request that the Rule or commentary state that a financial institution is permitted to indicate on the Model Form as a permissible revision the specific type of overdraft protection plan that it offers (e.g., overdraft line of credit) as the Form language currently refers to a linked savings account.

- Use of Model Form as disclosure

Some institutions may wish to incorporate the text of the Model Form into a consumer account agreement provided at account opening as a disclosure but without the language below the dotted line at the bottom indicating a consumer's preference. Assuming that the institution also provides the entire Model Form separately, is this use of the Model Form in the account agreement as a disclosure a permissible change under the Rule? We ask that the Board indicate in the Rule or staff interpretation whether such use is permissible.

Disclosures incident to promotion

CBA asks that the Board indicate a financial institution's obligation to disclose each of the disclosures listed in § 230.11(b)(1)(i)-(iv) under the following scenario: the institution had previously furnished the Model Form and, during the course of a subsequent telephone call with the consumer, information is communicated that could be viewed as constituting an "advertisement promoting the payment of overdrafts" under § 205.11(b). Some of the information listed in § 230.11(b)(1)(i)-(iv) would have already been disclosed in the previously

provided Model Form. Please clarify whether, in this situation, a financial institution must disclose all of the information anew.

Clarifications regarding telephone calls

Questions have arisen regarding the confirmation requirement in connection with telephone calls. We expect that there will be occasions when a customer calls the financial institution just as overdraft protection services are needed. The prior confirmation requirement would make it difficult for institutions to respond in a helpful way. Therefore, we request that the Board develop commentary to clarify that institutions may comply with the confirmation requirement by sending it within some reasonable period after a consumer's telephonic request. Given that the consumer specifically requests the service, there would be no harm to the consumer for the confirmation to follow.

Also, with respect to communication of the opt-in right in the course of a telephone call, please confirm whether it is permissible for a financial institution to read the contents of the Model Form to the consumer, that is, whether this is a permissible means of securing the consumer's affirmative consent electronically (assuming the consumer agrees to the provision of the Model Form electronically).

Separate document

Please clarify whether the Model Form must in all instances be furnished to a consumer in a separate document or merely segregated from all other information. For example, some financial institutions may desire to set forth the Model Form within a brochure (that is, not in a separate document) but in a manner that is segregated through borders encircling the Model Form to highlight it. We understand that the Board wishes to discourage institutions from diluting the significance of the disclosure and affirmative consent, but financial institutions should not be compelled to furnish costly separate mailings as long as the information is appropriately segregated, clear, and readily understandable.

Same terms

We ask that the Board clarify that it is permissible for a financial institution to offer inducements to prompt consumers to acquire covered overdraft protection consistent with the requirement to provide consenting and non-consenting consumers with the same account terms, conditions, and features (except for the overdraft service for ATM and one-time debit card transactions). In this regard, we believe that as long as all of the required communications comply with the Rule (and thus the underlying purpose of ensuring consumer consent is achieved) then financial institutions should not be further restricted from deploying customary marketing incentives that they might use when offering any other service in the normal course of business. A flat prohibition on marketing any product would be highly intrusive.

Consent for multiple accounts

CBA asks the Board to clarify that the Rule does not require each consent and each confirmation to relate solely to a single account. Requiring multiple consents and multiple confirmations from a single consumer is burdensome on both the consumer and the financial institution, is potentially confusing, and serves no policy interest. If the Rule should require that each consent be limited to a single account, the Rule should clarify that a consent with respect to multiple accounts (e.g., the consumer pencils in multiple account numbers on the consent) may be cured if the financial institution sends a separate confirmation for each account.

In light of the potential changes or clarifications that may be indicated by this latest round of proposed rulemaking, CBA asks that financial institutions be afforded a reasonable period (such as six months) to comply with any changes to the Rule. Thank you for your consideration of CBA's comments.

Sincerely,

Leland Chan
General Counsel